

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-016329

10/22/2008

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

JOHN GILDING

MICHAEL W PEARSON

v.

JOHN S CARR, et al.

DAVID N FARREN

ALAN N ARIAV

MINUTE ENTRY

The Court has considered Plaintiff's Motion For Partial Summary Judgment Re: Defendant Marks' Amended Non-Party At Fault Notice; Plaintiff's Motion For Partial Summary Judgment Re: Defendant Carr's Non-Party At Fault Notice; Plaintiff's Motion For Leave To Amend Complaint; Defendant Marks' Joinder In Defendant Carr's Response To Plaintiff's Motion For Leave To Amend Complaint; and Joinder By Defendant Marks in Johnstons' Response To Motion To Amend The Complaint and the briefs. The Court finds and rules as follows.

Defendant Marks' Amended Non-Party At Fault Notice and Defendant Carr's Non-Party At Fault Notice

Defendants Carr and Marks have both filed Notices of Non-Party at Fault naming Plaintiff's counsel, Mr. Pearson, his wife, and the law firm of Curry, Pearson & Wooten. The Court repeats what it has said several times: This is not a trial for the wrongful death of Linda Petersen. The sole issue is whether the accusation that Plaintiff caused her death was defamatory. The damages, if any are awarded, will be those suffered by Plaintiff as a consequence of being defamed, not those suffered by Ms. Petersen's family for the loss of their

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loved one. Defendant's second argument Plaintiff, aided and abetted by Pearson, through his and Mr. Pearson's harassment of Ms. Petersen tortiously interfered with his own contract is not logical.

Therefore, IT IS ORDERED granting Plaintiff's Motion For Partial Summary Judgment Re: Defendant Marks' Amended Non-Party At Fault Notice and Plaintiff's Motion For Partial Summary Judgment Re: Defendant Carr's Non-Party At Fault Notice.

Plaintiff's Motion To Amend Complaint

Dealing first with Defendant Carr's arguments, two points of dispute can be reconciled. Both sides appear to agree that civil conspiracy is not an independent tort, but rather a premise for extending liability from the immediate tortfeasor to his co-conspirators. How it is denominated in the Complaint is not important, as long as the jury is properly instructed (a matter for another day). Both sides also appear to agree that, while the torts of defamation and injurious falsehood are not identical, they have considerable overlap. Whether and to what extent the evidence will show instances falling within the definition of one but not the other cannot at this stage be predicted. If the evidence fails to show an injurious falsehood that is not a defamation, that can be raised when closing instructions are prepared.

The third objection raised by Defendant Carr, that a public figure can have no claim for invasion of privacy, goes beyond what the Arizona case law can support. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335 (1989), and the cases it cites deal with false light invasion of privacy. Plaintiff's allegation, however, is not for false light. He characterizes it as invasion of seclusion (RESTATEMENT (SECOND) OF TORTS § 652B, *see especially* comment c). If the parties believe the distinctions as outlined in RESTATEMENT (SECOND) OF TORTS § 652A, comment d, among the various forms of invasion of privacy are material as the case progresses, that can be further developed; it does not appear to the Court that they are so critical as to render the proposed amendment futile. *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz. 297 (1998), turns on a different question, whether under the Public Records Law personal facts such as those at issue here fall under the statutory exclusion for "confidentiality, privacy, or the best interests of the state" and are of such sensitivity as to outweigh the presumption of disclosure. *Id.* at 300 ¶ 9; *see also id.* at 304 ¶ 28 (Martone, J., concurring and dissenting in part) (framing issue as "whether a birth date raises privacy interests sufficient to overcome the presumption of open records"). It does not address whether relief in tort exists for disclosure, under any of the theories of invasion of privacy. All of this, however, is a matter for motion practice as the case proceeds; the issue is not so clear-cut as to render the amendment obviously futile. No prejudice has been shown from addition of these new claims.

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The arguments raised in Defendant Johnston's Response with regard to the addition of NATCA and related parties are technically premature: if they have a federal pre-emption defense under the Civil Service Reform Act or a statute of limitations defense, he lacks standing to raise those defenses on their behalf. Since those defendants once made parties will have the right to argue for themselves, it may not even be proper, and will certainly result in duplication of effort, for the Court to rule, even preliminarily, in their absence. Again, the matter is not so self-evident as to render the amendment obviously futile, and doubts are to be resolved in favor of liberal allowance of amendments.

Therefore, IT IS ORDERED Plaintiff's Motion for Leave to Amend Complaint is granted without prejudice to the right of any party to address the substance of the new claims as the case develops and without prejudice to the newly-added parties to bring forward any defenses they may have.